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June 2011

Legal Victory for Affordable Infill Housing

A recently published California Court of Appeal (Court) decision upholding approval by the City of Berkeley of an infill, mixed-use affordable housing development has important implications for housing developers and localities seeking to facilitate development of sustainable communities. A neighborhood group challenged the grant of a density bonus and the use of California Environmental Quality Act's (CEQA) infill exemption for the development State density bonus law (SDBL). Government Code Section 65915, allows for an increase in residential density and other incentives for developers who agree to provide a percentage of units reserved for low- and very low-income households. Under CEQA, a project may be exempt from its requirements if it meets various infill criteria. The Court in **Wollmer v. City of Berkeley (Cal. Ct. App., Mar. 11, 2011; 11 Cal. Daily Op. Serv. 3896 [A128121, WL 847013])** rejected these challenges, reinforcing the use of SDBL and the categorical CEQA infill exemption for qualified projects.

SDBL: Petitioners challenged the grant of the density bonus on three grounds. Engaging in a thorough analysis of SDBL, the Court rejected all three claims. Petitioners first asserted the use of federal Section 8 subsidies violates the SDBL affordability requirements in that it allows the developer to receive rental compensation in excess of "affordable" rents. Referencing affordability regulations adopted by the Department of Housing and Community Development, the Court disagreed, stating, *"It is apparent ...that, contrary to appellant's assertions, "affordable rent" within the meaning of our density bonus law is concerned with the rent that a tenant pays, not with the compensation received by the housing provider."* The Court found that its interpretation is fully consistent with the intent of SDBL to provide economic incentives for the development of affordable units.

Petitioners also argued that the City granted waivers for standards for height, stories and setbacks in violation of the SDBL. SDBL requires waiver of development standards that preclude physical development of projects qualifying under the law. The waivers were granted to accommodate certain physical amenities in the development, including parts of the commercial space. Petitioners claimed the waivers could be granted only as needed for construction of the qualifying housing project. The Court rejected that position stating, nothing in SDBL requires a development without physical amenities. If the City had rejected those waivers, it would have had the effect of "physically precluding" the development and that action would have been contrary to SDBL.

Finally, the Court upheld the City's calculation of the number of density bonus units granted in response to the affordability levels proposed by the developer. Petitioner disagreed with the figure adopted by the City as the "the otherwise maximum allowable residential density" which under SDBL serves as the basis of determining density bonus. After a technical discussion of local ordinances and plans applicable to the development, the Court found the City's determination to be accurate and consistent with both SDBL and local City ordinances.

Use of CEQA "Infill" Exemption: The City granted the development an exemption from CEQA under Section 15332 of CEQA Guidelines, a categorical exemption for projects meeting certain infill, size and environmental criteria*. Petitioners argued with the waivers authorized by SDBL project; as approved it did not meet the consistency requirement of subdivision (a). The Court agreed with the City that the waived development standards were not "applicable" to the project and the consistency standard is met. The Court also upheld the City's determination that no "unusual circumstances" existed that would prevent the use of the infill exemption (CEQA Guidelines, Section 15300.2(c))**. The Court pointed out the Petitioner's opinion regarding the location and traffic patterns around the project do not constitute substantial evidence supporting a fair argument that the unusual circumstances exception should apply.

Finally, Petitioners offered the interesting argument that the infill exemption should not apply because the City allowed the developer to reduce traffic impacts -- by dedication of land for a new turn lane -- to a less than significant level. Petitioners alleged "collusion" between the City and the developer to avoid CEQA review by qualifying for the exemption. The Court's response was "so what?" stating nothing in CEQA forbids a developer from improving projects to reduce environmental impacts. That is a desirable result and cannot be a basis for overturning the City's approval of the project.

Overall the decision offers significant support for the use of SDBL and the infill CEQA exemption. In addition, to resolve the specific issues at hand, the opinion offers thoughtful insight into the intent and purpose behind both valuable development tools and how they can be applied in a practical and legal manner. The ruling generally lauds the actions taken by the City and its efforts to properly follow the law. In reference to the consistency requirement of section 15332(a), the court states, ". . . *Wollmer asserts that by applying the exemption in a way that harmonizes with relevant law, the City in effect amended the exemption, improperly expanded its definition, and exceeded its jurisdiction. There is no support for this misguided assertion. The City properly applied the plain meaning of Guidelines section 15332, subdivision (a) to its own codes in a manner that was in harmony with the state's density bonus law, and so applied, properly found that the project was exempt from CEQA.*"

This case is an illustration of effective interpretation and application of these important laws in a way that both enhances the feasibility of affordable infill housing development and allows it to withstand a broad-based legal attack. California's ability to meet its housing, economic, and environmental and sustainability goals depends on the development of a sufficient supply of housing, in the right locations, affordable to families and the workforce. This decision will support the efforts of local governments and the building community throughout the State to meet these important goals.

End Notes:

*Section 15332. Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.(a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.(b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.(c) The project site has no value, as habitat for endangered, rare or threatened species.(d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.(e) The site can be adequately served by all required utilities and public services.

** (c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.